IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1852

MARK OSBORN,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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The Petitioner, Mark Osborn, prays that a Writ of Certiorari issue to review the Order and Judgment of the Supreme Court of Illinois affirming the Order of the Appellate Court of Illinois, First District, affirming the Petitioner's conviction rendered in those proceedings on March 30, 1978.

OPINION BELOW

The Supreme Court of Illinois denied leave to appeal herein and in effect affirmed the decision of the Appellate Court of Illinois, First District, without formal opinion by Order on March 30, 1978. The opinion of the Appellate Court is unreported as yet and appears at Appendix "A".

JURISDICTION

The Order, a judgment of the Supreme Court of the State of Illinois, was entered on March 30, 1978. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

The Petitioner was tried and convicted, after a bench trial, of rape and deviate sexual assault. During the trial, and over the objection of the defense, the Court allowed into evidence a totally unrelated alleged criminal act or enterprise. The questions thereby arising are:

1. Whether the State of Illinois deprived Petitioner of Due Process of Law when they tried the Petitioner relying heavily upon evidence of an unrelated alleged crime to support the conviction for the charges on trial;
2. Whether the Petitioner was deprived of a Fair and Impartial Trial because he was confronted with the additional burden of meeting and defending against not only the charges on trial but, also, the alleged other crime;
3. Whether, when considered in its entirety, the case made out by Petitioner is so shocking that it presents a departure from fair and orderly State Court Protedure required by the provisions of the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

The Petitioner was found guilty after a bench trial upon the charges of rape (Ill. Rev. Stat., Chapt. 38 § 11.1) and two counts of deviate sexual assault (Ill. Rev. Stat. Chapt. 38 § 11.3) and sentenced to from five to 18 years in the Illinois Department of Corrections under Indictment No. 75-1424. Direct appeal was thereafter filed with the Illinois Appellate Court, First District (No. 76-542) which affirmed the rape conviction on September 26, 1977. However, the Appellate Court reversed outright and vacated the Trial Court's finding on the two counts of deviate sexual assault on sufficiency grounds and thereafter *sua sponte* reduced Petitioner's sentence to four to eight years (See attached opinion, Exhibit "A"). Thereafter, a Petition for Rehearing was filed, on October 17, 1977, considered by the Court and denied on October 24, 1977. A Petition for Leave to Appeal to the Supreme Court of Illinois was prepared and filed and likewise denied on March 30, 1978. The issue raised herein concerning the use of the other crime evidence as raised in all the Courts below as herein in addition to sufficiency of the evidence.

The State's evidence in this case consisted mainly of the uncorroborated testimony of Ms. Barbara Banich, the prosecutrix herein. Ms. Banich testified substantially as follows:

She was a single 24 year old college graduate living alone in a studio apartment at 677½ Wrightwood in the City of Chicago (Record pp. 20, 21, 200). She was employed in marketing and communications by Encyclopedia Brittanica and Spiegels since February 1974 (Record p. 22) and in December 1974, she had occasion to read the *Chicago Tribune* want ads and answered

an ad for employment by telephoning the number listed therein (Record pp. 26, 27, 28). She left her phone number in response to a tape answering service message and on Sunday, December 15th, she received a phone call in response thereto from the Petitioner, Osborn (Record p. 29).

An interview for the job was set up for 7:00 p.m. on December 18, 1974 at 1030 North State, Chicago, Illinois (Record pp. 30, 32, 33). Ms. Banich went to the interview and was admitted by Mark Osborn whom she identified in court (Record pp. 38-40, 41). They conversed for about 15 minutes regarding the job (Record p. 42). Thereafter, another applicant arrived, and the interview was terminated (Record p. 43). The Petitioner told Ms. Banich before she left that he would call to talk to her further about the job (Record p. 44).

On January 11, 1975, Ms. Banich testified she received a phone call from Osborn at her apartment wherein he asked her if she wanted to attend a hockey game. She refused, and the conversation was terminated (Record p. 44). On January 17, 1975, Osborn called again and asked her to a basketball game with another couple on January 18, 1975 (Record pp. 46-47). Ms. Banich told Osborn of a previous party commitment and they agreed to attend both functions together (Record pp. 47-48).

On January 18, 1975, Osborn came to her apartment at about 7:00 p.m. and she admitted him (Record p. 49). They stayed about five minutes while she fixed some food for her dog and then left the apartment for the party (Record p. 50). After arriving at the party, they met the host and hostess, David Krause and Nicki Slusser Krause, ate some chili, and drank wine (Record p. 50). They remained at the party for about 45 minutes before the other couple, Howard MacArthur and Nancy, arrived (Record p. 53), after which the four of them departed in Howard's van for the basketball game (Record p. 53).

In the vehicle, Howard and Nancy were seated in front; Banich and Osborn in the back seat (Record p. 55). They

arrived at the game to see the Bulls play the Knicks. Throughout the game, Barbara sat next to Osborn and they conversed about basketball and the game (Record p. 56). After the game, they returned to the party with Howard and Nancy (Record p. 58) arriving back at about 10:30 p.m. They remained at the party another 2½ hours, but Banich claims to have had nothing further to eat or drink (Record p. 59).

All four left the party at about 12:30 or 1:00 a.m. and walked down the street towards the van (Record p. 60). Howard and Nancy were walking up ahead of Mark and Barbara. She testified that Howard and Nancy walked to their van, while she and Mark walked to her apartment (Record pp. 60-61). While walking to her apartment, she testified Mark asked her if he could come up for some coffee; it was a cold night, and she said yes (Record pp. 61-62). They went up to her apartment alone where she fixed hot chocolate while he sat on the studio bed in the living room of the apartment (Record pp. 62-63). They thereafter had a conversation about dogs and other small talk (Record p. 64) which lasted about ½ hour (Record p. 66).

During this time, Osborn allegedly told her he usually goes to bed with women he goes out with, whereupon she responded that she didn't (Record p. 64). He then allegedly told her that he didn't call women a second time if he didn't go to bed with them, and she said she told him not to call her again (Record p. 65). They then conversed about the job and Osborn's background. At this point, Osborn said he was going to leave but asked for a cold drink first, whereupon she got him a beer and returned to the couch (Record p. 67). She did not order Osborn out after his references during the conversation to sexual activity or after his alleged sexual advances. The conversation continued. Finally, Osborn asked to use the washroom preparatory to his leaving (Record p. 68). He remained in the washroom a short period of time and returned (Record p. 69). The washroom is in the direction of the kitchen but before the kitchen in the hallway.

Upon Osborn's return from the bathroom, he allegedly said, "I don't want to alarm you but I am going to have sex with you" and grabbed Banich by the throat, squeezing her throat and pushing her backwards down on the couch (Record p. 70). At this time, she claims Osborn produced a knife which she recognized as a steak knife from her kitchen (Record p. 71). He allegedly put the knife to her throat and ordered her to disrobe (Record p. 72). Banich testified she tried to scream, but couldn't (Record p. 72) although she could talk and allegedly told the Petitioner that she knew who he was and where he lived and he couldn't get away with something like this (Record p. 73).

At this point, she says that Osborn got up, let go of her throat, and ordered her to disrobe (Record p. 74). She said she merely sat there while he counted to five and did not disrobe (Record p. 75).

The Defendant then allegedly got up again and recounted to five during which she, unassisted, removed all her clothing (Record p. 77). At this time, the Defendant also removed all his clothing and while doing so she made no attempt to escape, call or scream out for help, but merely sat there. At this point, she told the Petitioner that she was in her menstrual period to allegedly discourage his sexual advances (Record p. 77). She then asked to leave the room to remove her sanitary device to which he initially consented but later refused as she attempted to leave the room (Record p. 77). She then removed the device herself in front of the Petitioner in the living room (Record p. 78).

At this point she testified they returned to the couch and he told Banich to "suck him" (Record p. 79). She refused to do so and he allegedly grabbed her by the neck and pulled her down over his penis (Record p. 79). The Defendant no longer had the knife and the last time she remembers seeing the knife was when they were at the door when she attempted to leave to remove her sanitary device. She found the knife the next day

on the desk by the door where they were standing before returning to the couch (Record p. 146). The knife was never turned over to the police, inventoried, presented as evidence nor shown to any other corroboration witness.

When the Petitioner allegedly pulled Banich down over his penis, her mouth made contact with his penis, but she never performed oral copulation and didn't open her mouth. The contact was slight (above five seconds) and momentary (Record pp. 79, 220, 211).

The Defendant then allegedly pushed Ms. Banich down on the couch in a prone position and put his mouth on her vagina (Record p. 81). No testimony is adduced as to what he did when he put his mouth on her vagina other than his mouth momentarily touched her vagina.

Ms. Banich then testified that the Petitioner had "sexual intercourse three times with her" (Record p. 81). She testified that after the above incidents concluded, she ordered the Respondent out of the apartment, but he said he would leave when he was ready and remained there another 45 minutes (Record pp. 82-83). The Petitioner and she put on their clothing and remained on the couch talking and conversing (Record pp. 82-83). There is no testimony that either party cleansed themselves or bathed at that point despite Ms. Banich's alleged menstruation on the night in question. The Petitioner was in the apartment a total of about 2½ hours (Record p. 83).

After the incident, they conversed about why he did it and his relationship with other women (Record p. 84). During this time, the Petitioner did not have any weapon and was not forcefully holding Ms. Banich, yet she made no attempt to scream, get away, call the police or leave the apartment. Finally, the Petitioner left her apartment at about 4:00 a.m. (Record p. 89).

After the Petitioner left the apartment, Ms. Banich took a shower, wrapped herself in a blanket and went to sleep on the

couch where she remained until 10:00 a.m. the next morning (Record p. 85). She did not call the police, make an outcry, call for help, call friends or her parents or do anything to report the crime or make others aware that an alleged crime had been committed.

After she arose the next morning, she called Rape Crisis. She then testified to a series of calls to Rape Crisis to report the rape which occurred throughout the proceeding, all of which testimony was objected to as being hearsay and prejudicial by defense counsel and all of which was overruled and allowed into evidence by the Trial Court (Record pp. 91 to 105). The defense counsel repeatedly asked for a mistrial concerning this testimony, which the Trial Court denied (Record p. 93).

Ms. Banich then testified to a phone call she made to Nicki Slusser Krause the day after the incident and, again, over objection of the defense, testified that she told Nicki Slusser Krause that she had been raped (Record p. 97) by Mark Osborn. Ms. Banich was allowed to testify, over objection of the defense counsel, as to the details of what she told Nicki Slusser Krause (Record p. 98), reciting how Osborn, the person she was with at the party the previous evening came back to her apartment asking to come up for coffee and then assaulted and raped her. She testified that she told Nicki Slusser Krause she was afraid he would come back (Record p. 98), yet never called the police. Ms. Banich testified that about an hour after she called Nicki Slusser Krause she called her mother, but never told her mother of the alleged incident (Record p. 101).

On cross-examination, Ms. Banich admitted that she never went to the hospital after the incident for treatment or a medical examination (Record pp. 111-112) and didn't contact the police until approximately one week after the occurrence (Record p. 112). She also admitted that she made no attempt to contact anyone regarding the incident until over seven hours after the alleged occurrence (Record pp. 116-117).

Ms. Banich denied that on the night of the occurrence that she had been out on a date with Osborn and insisted that the purpose of the evening was to discuss the job (Record p. 138). She stated that when Osborn had asked her for a date, she refused (Record p. 138). She insisted the purpose of the evening was to discuss the job (Record p. 134), although she admitted that the job was not mentioned during the entire course of the evening and only incidentally talked about while in her apartment.

Ms. Banich admitted she never saw Osborn in her kitchen where the knife was allegedly kept (Record p. 145) and she never saw him secure the knife (Record p. 146). She testified that the kitchen was not next to or contiguous to the bathroom, but was six or seven feet further down the hallway from the bathroom (Record p. 145). She testified Osborn was never out of her visual presence except when he went to the bathroom (Record pp. 144-145-146-147). She testified she found the knife on the desk in the apartment after he left (Record p. 146) five feet away from the couch bed combination; however, no testimony was elicited as to what, if anything, she did with the knife thereafter. No evidence was submitted that she ever submitted the knife to the police or told them about it nor was any testimony submitted as to any fingerprint analysis thereon to attempt to connect the Petitioner to the knife. The knife was never submitted during the trial as an exhibit.

Ms. Banich testified that the Petitioner did not have the knife in his hands when he returned from the bathroom (Record p. 148), but he produced it from some unknown location immediately after his return from the bathroom (Record p. 150). She claimed the knife had a seven or eight-inch blade (Record p. 149). She admitted that the Petitioner did not have the knife at any time after her disrobing and removal of the sanitary device and, specifically, the Petitioner was not armed with the knife during the alleged sexual assaults or at any time thereafter, although they remained together for a substantial

period of time (Record pp. 147, 237, 238, 239, 240). Although the Petitioner was unarmed, she never screamed out, called for help, attempted to get away or physically resisted the Petitioner (Record pp. 201, 207, 220-228). Initially, Ms. Banich denied that the Petitioner ever engaged in any touching, petting or kissing or any other contact which would be considered sexual foreplay (Record pp. 153, 154, 155, 156, 157). However, she did finally submit that the Petitioner had tried to kiss her once (Record p. 158), he did move next to her on the couch and put his arm around her (Record p. 168), and he did fondle her breasts (Record p. 169), claiming it was not unusual for a man to touch her breasts (Record p. 169) and that the Petitioner was "getting friendly" with her (Record p. 170). She also admitted having testified at the preliminary hearing that while on the couch the Petitioner was touching her anywhere he could (Record p. 171) and that during this time they were talking about going to bed together (Record pp. 179-180). She admitted, further, that during this course of conduct on the couch, she never asked Osborn to leave, never told him to stop, she did not scream or cry or call for help (Record pp. 172-175).

Ms. Banich testified that other people were present in the building that evening in adjacent apartments (Record p. 242), but she never sought their aid or reported the incident to them either during or after the alleged incident (Record p. 245).

The next witness to testify was Linda Barnes, who had no testimony to offer regarding this alleged occurrence, but was called to testify to a *subsequent* incident obstensibly under the theory of using other offenses to show pattern, common scheme or design. Defense counsel, prior thereto, sought to exclude her testimony as prejudicial and not within the common scheme, pattern and design exception to the admissibility of evidence of other alleged crimes and as being so highly prejudicial so as to deny Petitioner due process. The Trial Court overruled these objections and allowed Mrs. Barnes to testify over objection in complete detail as to an unrelated incident which allegedly

occurred between her and the Petitioner (Record pp. 265-272). The Trial Court allowed this, notwithstanding the fact that charges brought by Mrs. Barnes against the Petitioner had already been judicially heard and the Petitioner was discharged on those charges prior to this trial. Defense counsel sought to bring a certified copy of the Court's Order discharging the Petitioner and finding no probable cause approximately one year prior to the trial herein, but the Trial Court ruled this unnecessary and took judicial notice of this fact (Record p. 384). Numerous objections and mistrial motions were made during the course of the trial concerning this testimony and extensive arguments and citations of case law were presented to the Trial Court both before and after the Barnes' testimony (Record pp. 265 to 272; Record pp. 320 to 332; Record pp. 380 to 385).

Mrs. Barnes was allowed to testify in depth and in great detail as to the entire alleged incident between herself and Mr. Osborn. She testified that on January 16, 1975, she read an ad for collating work and responded thereto (Record p. 274). That the Petitioner dropped some work off at her house for her to do and he was to pick up the papers when she finished (Record pp. 276 to 278). The Petitioner was supposed to pick the papers up on January 19, 1975, a Sunday afternoon (Record p. 278), and attend a party Barnes was having that afternoon with an artist friend who was bringing "dirty movies" (Record p. 292). Osborn did not show up at the party or pick up the work (Record p. 278). Thereafter, Mrs. Barnes testified that she tried to contact Osborn several times (Record p. 278), but didn't reach him until Thursday afternoon, January 23, 1975 (Record pp. 278-279). At that time, she asked him to pick up the papers that evening and, again, invited him to another party she was having that evening (Record pp. 279-281; 291; 293). She asked him to bring along some pornographic movies to show at the party (Record p. 293). Before arriving that evening, the Petitioner called about 10:30 p.m.

and inquired as to whether the party was still on and whether he should still come over (Record p. 281). Mrs. Barnes told him to come right over. He arrived about 11:00 p.m. (Record p. 282) and Mrs. Barnes, her husband, and another couple were present at the time in the apartment.

After Osborn arrived, they showed the pornographic movies (Record p. 283) which depicted people having sex, couplating, and engaging in deviate sexual acts (Record p. 295). During the course of the evening they were all consuming alcoholic beverages and smoked marijuana (Record pp. 297, 298, 319). After the movies were over, the other couple left and Osborn was invited to sleep over in the guest room by Barnes and her husband (Record pp. 283-297). The next morning her husband left for work while Osborn was still there and Barnes remained in her bed (Record p. 285). Barnes testified she slept in the nude except for her panties (Record pp. 285-301) and that while she was upon the bed, the Petitioner came to her bedroom, fully clothed (Record p. 300) and position himself in the doorway to her bedroom (Record p. 285). At this point, Osborn allegedly asked her if he could get in bed with her (Record pp. 285-302), whereupon she asked "Why?" (Record pp. 285-304). Defendant allegedly said, "I want to ball you" (Record pp. 285-304), whereupon Barnes testified she said, "No" (Record pp. 285-304). At this point, she testified the Petitioner left her bedroom and went into the kitchen and she got up, put on a robe and followed him to the kitchen were she made tea (Record pp. 285, 305, 306, 307). She never ordered Osborn out of the apartment, made no outcry, didn't call the police nor attempt to leave the apartment herself. (Record p. 307). She never reprimanded Osborn for talking that way nor felt insulted or offended (Record p. 307). In the kitchen, Osborn wrote out a check for her services and went into the living room and prepared to leave (Record p. 286). As the two of them walked towards the door in the foyer, Osborn allegedly grabbed her and said, "We're going to bed" (Record p. 287).

He pushed her towards the bed, but before they reached the bed she told him it would be rape if he continued. Whereupon, he promptly stopped, released her, pushed her onto the bed and left the apartment mumbling (Record p. 288). No weapon was alleged to have been used (Record p. 288) and Barnes admitted that she never resisted, cried out for help or attempted to get away (Record p. 313). Barnes admitted that the Petitioner never touched her breasts, thighs or other parts of her body (Record p. 316), never took off her underwear or ordered her to disrobe (Record p. 316), never directed her to "suck him" (Record p. 316), and never performed or forced her to perform any sexual acts or deviate sexual conduct. Barnes never called the police nor made an outcry until several hours later after consulting Rape Crisis, as Banich had done. The police were called at about 3:00 p.m. (Record p. 317) several hours after Osborn had left.

David Krause testified that he lived with Nicki Slusser in the apartment at 2700 Hampton Court, Chicago, Illinois (Record pp. 337-352). They had a wine and cheese and chili party in January of 1975 which Barbara Banich attended with Mark Osborn (Record pp. 339-340). They arrived at about 6:30 p.m. and stayed about 45 minutes (Record p. 341). Ms. Banich had a glass of wine (Record p. 342). Thereafter, the other couple arrived and then all four departed (Record p. 343). They all returned about 10:00 p.m. and remained at the party for about 2½ or 3 hours, leaving sometime around 12:30 a.m. (Record pp. 344-345). He received a phone call from Ms. Banich the next day and Nicki had a conversation with her (Record pp. 348-350). Later that evening, about 5:00 p.m., they went over to Barbara's house to pick her up and bring her back to their apartment (Record pp. 350-351). When he saw Ms. Banich on the 19th day of January, he saw no cut on her hand (Record p. 52).

The next State witness was Nicki Slusser Krause, the party's hostess. Nicki Slusser testified that she received a phone call

from Ms. Banich about 10:00 a.m. the day after the party (Record pp. 392-393) and had a conversation with her (Record p. 394). Again, this testimony was over the objection of defense counsel (Record p. 395). The witness then testified that she waited seven hours before going over to assist and aid Ms. Banich and return her to the witnesses' apartment (Record p. 367). The witness was never shown any cut or any knife and she did not call the police or a doctor to examine Barbara (Record pp. 399-400).

Howard MacArthur, who was with Osborn and Banich the evening before the alleged incident (Record pp. 407-408) testified for the defense that he is a Certified Public Accountant and is employed in that type of work (Record p. 409). On the evening in question, his date was Nancy LaPierre (Record p. 409) and his testimony concerning the evening in question basically follows the facts as established by Ms. Banich. However, MacArthur testified that when the four of them left the Krause apartment on the final occasion, he overheard Ms. Banich, herself, invite Osborn up to her apartment (Record p. 412). He heard Ms. Banich at that time state, "Would you like to come over to may place?" (Record p. 413). He testified that at that point they separated. In cross-examination, he testified that he was positive of the conversation.

The Petitioner then testified in his own behalf. He testified that he did, in fact, go to Ms. Banich's apartment on January 18, 1975 and first arrived there at about 6:30 p.m. (Record pp. 417-418). He stayed about five minutes and then the two of them departed to the party (Record p. 419). They stayed at the party 45 minutes where they met MacArthur and his date and went to the basketball game (Record p. 420). Osborn testified that he acted towards Ms. Banich as he would towards a normal date, making physical contact with her many times during the evening (Record p. 421). He had his arm around her on occasion (Record pp. 421, 423, 425, 254, 457, 461). He kissed her a "quick kiss" on a couple of occasions (Record pp.

421-461) and held hands repetitively (Record pp. 421, 423, 425). Ms. Banich never pulled away, never told him not to touch or kiss her, nor in any way indicated displeasure with his conduct (Record pp. 421-423, 425) and, in fact, she had her arm around him as they walked back to her apartment after the party (Record p. 425).

They left the party with Howard and Nancy and as they were walking towards her apartment , she asked Osborn if he would like to come back to her apartment and have a drink (Record p. 424). Osborn agreed and then told MacArthur he wouldn't be riding home with MacArthur and Nancy, that he was going to have a drink at Barbara's apartment (Record p. 424). Osborn and Barbara then left MacArthur and Nancy and they went to the apartment (Record p. 425).

After they went up to the apartment, Barbara asked if he wanted anything to drink and she served him a beer (Record p. 426). They sat on the studio bed-couch and he put his arms around her and she put her arms around him (Record p. 427). They began petting and kissing with Osborn unbuttoning her blouse and putting his hand inside her bra, fondling her breasts (Record pp. 427-469). This conduct continued for about four or five minutes (Record p. 427). At this point, Osborn slid his hand inside her pants and fondled her vaginal area, whereupon Ms. Banich placed her hand on top of his and asked that he not do that because she was having her period (Record pp. 429-469). At this point, Osborn removed his hand and they continued petting and kissing on the couch (Record pp. 429, 474-475). During this time, they talked about a number of things and watched a Hitler documentary until about 2:00 or 2:30 a.m before he left (Record p. 430).

Osborn denied ever having sexual intercourse; denied ever placing his mouth on her vagina; and denied ever placing her mouth on his penis (Record p. 431). Near the end of the evening, Ms. Banish asked him if anyone was selected for the job, and he told her he had given it to another girl (Record

p. 431). At this time, rather abruptly and severely, Ms. Banich announced that she was tired now and that Osborn had better leave (Record pp. 431-432). Osborn testified he then left. Osborn denied ever touching or having a knife in the apartment (Record pp. 470-478). At this point, both sides rested.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with fundamental fairness and due process principles enunciated by this Court. It is an elementary principle of criminal law that a state's evidence law cannot take precedence over fundamental constitutional doctrines. *Akins* v. *Texas,* 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692. In the case at bar, the State of Illinois relied upon a rule of evidence concerning other crime evidence which we contend worked to substantially deny Petitioner of a fair trial. The States have no power through judicial proceedings to impose upon Petitioner a rule of evidence which will deprive him of immunities granted by the Federal Constitution. *Ciucci* v. *Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983; *Michelson* v. *U. S.,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168. The State proceedings herein were the equivalent of trying Petitioner upon the joint charges of the Barnes as well as the Banich incidents, although Petitioner was never charged with any offense involving Barnes. The evidence showed two alleged sexual assaults, the indictment charged only one.

This Court has said that due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that conviction cannot be brought about by methods that offend "a sense of justice". *Rochin* v. *California,* 342 U. S. 165. Although it is true that the State of Illinois is free to regulate its criminal procedures in accordance with its own conception of policy, it cannot do that which "offends principles of justice" so rooted in traditions of conscience of our people as to be ranked as fundamental. *Burgett* v. *Texas,* 389 U. S. 109; *Johnson* v. *U. S.,* 318

U. S. 189. The action of the State of Illinois admitting into evidence such patently prejudicial evidence, without countervailing probative value, and resting upon such questionable proof offends principles of justice so rooted in the tradition of our people as to be ranked as fundamental and therefore resulted in depriving Petitioner of due process and substantial fairness. This case presents a kind of other crime evidence incased in arbitrary and prejudicial state action which violates the fundamental sense of decency in state court criminal trials.

As a general rule, apart from some very limited exceptions, evidence of the commission of other crimes by an accused in support of the crime charged is inadmissible and is sufficiently prejudicial to constitute reversible error. See *Ciucci* v. *Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983. The law distrusts the inference that because a man has committed the other crime he is more likely to have committed the current crime and so, as a matter of policy, such testimony should generally be excluded and discouraged and, where admitted, carefully scrutinized and limited to avoid prejudice and insure its probative value outweighs any prejudicial effect. 1 Wigmore, *Evidence,* 3rd Ed. § 194. The limited exception to the above rule is that such evidence is admissible if it works to place the defendant in proximitly to the time and place of the offense charged, aids or establishes identity and tends to prove design, motive or common scheme. However, even within these limited exceptions, the Trial Court is granted broad discretion to balance prejudicial effect against probative value and where probative value is slight and the evidence of the prior offense suspect, weak, or not plain and convincing, or where the evidence of the current crime is weak and uncorroborated as the case at bar, such evidence generally should be discouraged and its admission has been held to be an abuse of discretion. McCormick, *Law of Evidence,* Chapt. 17, § 157.

In *U. S.* v. *Ostrowski,* 501 F. 2d 318 (1974), the Circuit Court of Appeals in holding such evidence prejudicial and

erroneously admitted set up three basic criteria in reviewing the admissibility of such evidence. The Court stated:

> "In analyzing the admissibility of evidence of a prior crime to prove an element of the crime charged, three considerations must be kept in mind: (1) recognizing the general rule that prohibits admission of such evidence of other crimes to prove the commission of the crime charged, it must be demonstrated that the evidence is of a type that fits within one of the exceptions to the general rule of inadmissibility; (2) even though evidence of a prior crime is relevant, the court must engage in a balancing process to decide whether the probative value of the evidence outweighs the possible prejudice to the defendant occasioned by such evidence; and (3) the evidence of the other crime must be clear and convincing."

The Court in its opinion herein held the other crime evidence of Linda Barnes admissible as falling within one of the recognizable exceptions to inadmissibility (*i.e. modus operandi* or common scheme). However, in so doing, the Court totally ignored any consideration of the required three criteria and misinterpreted and misapplied the third criteria. The Court ignored the basic precept in considering such evidence, that the presumption is against admission and such evidence should be generally excluded. 1 Wigmore, *Evidence*, 3rd Ed. § 194. The opinion in this case literally holds that admissibility of such evidence is presumed and the burden is on the defendant to show inadmissibility. This is clearly erroneous and violative of basic due process considerations in placing such a burden on the Petitioner. The law is clear that such evidence is clearly disfavored and all of the three criteria for admissibility must be carefully met before this presumption yields in favor of admission.

In the case at bar, the State presented evidence of another alleged *subsequent* (not prior) offense ostensibly under the theory of the "common scheme" exception. This evidence was patently prejudicial to the Petitioner to the extent that it violated due process considerations and denied him a fair trial.

The evidence in this case consisted of the uncorroborated testimony of the prosecutrix alone. No corroboration in the form of prompt outcry, immediate report to the police, physical trauma to the victim, recovery of weapons, torn clothing, medical examination or any other traditional element of prosecutrix corroboration was presented in this case. Thus, the State's case started off evidentiarily weak. As the Trial Court noted, the only substantial corroboration was the testimony of the other incident offered for "common scheme". The Trial Court noted this in its colloquy in finding the Petitioner guilty (Record p. 554). The Court termed this other offense evidence as the main corrobative factor to establish proof beyond a reasonable doubt in the case at bar (Record p. 554). This demonstrates how heavily the Court relied upon this evidence of another crime in finding the Petitioner guilty and indicates how prejudiced the Petitioner was by the erroneous admission of this testimony. This alone elevates the trial error concerning the admission of such evidence to due process prerogatives. *Brady* v. *Maryland*, 373 U. S. 83, 93 S. Ct. 1194, 102 L. Ed. 2d 215; *Miller* v *Pate*, 386 U. S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690.

A.

The Other Alleged Offense or Criminal Act Was Not Established to Have Occurred by Substantial Evidence and Clear and Convincing Proof.

It was pointed out to the Trial Court, prior to the admission of the evidence in question that the Petitioner prior to this trial had been arrested and charged with the offense of attempted rape in conjunction with the Barnes' allegations and the cause had proceeded to a preliminary hearing in the Circuit Court of Cook County, Illinois. It was also pointed out and the Court took judicial notice of the fact that the Court found "no probable cause" in connection with the Barnes' charges and discharged the Petitioner, finding her testimony incredible and, even if believable, that no attempt rape had occurred under

Barnes' version of facts (Record p. 384). The State thereafter abandoned the *Barnes* case and never sought or secured an indictment or further prosecuted that case. Nevertheless, the Court allowed Barnes to testify to substantially the entire incident that allegedly transpired between herself and the Petitioner. Her testimony was totally uncorroborated and consisted of the identical evidence presented before the prior court which one year earlier found no probable cause. This constitutes a clear violation of due process.

Corpus Juris Secundum states:

> "Evidence of other crimes committed by the accused should be admitted only where they are substantially established . . . Before evidence of the commission of other crimes by [the] accused is admitted, the trial court should satisfy itself that the evidence substantially establishes the other crimes, accused's connection therewith and their connection with the offense for which accused is being tried, and clear and convincing proof or the making out of at least *prima facie* case is required.
>
> "Evidence of a vague or uncertain character offered for the purpose of showing that the accused has been guilty of similar offenses should not be admitted under any pretense whatever; nor is mere proof of arrest, or indictment, or mere suspicion or proof of suspicious circumstances sufficient. So, before guilty intent may be inferred from other similar crimes, they must be established by evidence which is legal and competent, and plain, clear and conclusive. 22 A.C.J.S. § 690, p.791-792."

The proof in the instant case, Ms. Barnes' testimony, was not of such a character and did not even make out a *prima facie* case of attempt rape as the Court found when it entered the no probable cause order.

Ms. Barnes' testimony may be summarized, aside from its credibility, as follows: the morning after a marijuana and pornography party in her apartment to which she invited the Petitioner (Record pp. 279-280-281-291-293) while alone in her apartment, after having invited the Petitioner to stay over-

night (Record pp. 283-291), the Petitioner approached her bedroom door while she was in bed clad only in her panties (Record p. 285) and asked if he could get in bed with her (Record pp. 285-302). Ms. Barnes allegedly asked, "Why?" (Record pp. 285-304) to which Petitioner allegedly responded, "I want to ball you" (Record pp. 285-304), whereupon Barnes claims to have said, "No". At this point, Petitioner allegedly went to the kitchen and Barnes got up off the bed and followed the Petitioner to the kitchen. After having tea, and Petitioner issuing a check to Barnes for some clerical work she had performed, Petitioner got ready to leave and both walked towards the door. In the foyer, Petitioner allegedly grabbed Barnes and said, "We're going to bed" (Record p. 287) pushing her towards the bed. Before they reached the bed, she allegedly told Petitioner it would be rape if he continued, whereupon the Petitioner promptly desisted, released her, pushed her on the bed, and left the apartment mumbling (Record p. 288).

According to the above version of facts, no substantial step towards any sex offense was perpetrated. Furthermore, no manifestation of an intent to rape or have sex by force and against the will of Ms. Barnes was presented by her testimony. As soon as resistance was manifested, the Petitioner desisted. Thus, even if Barnes' bizarre story was believable, it is insufficient, as a matter of law, to establish even a *prima facie* case that a crime was committed. The Prosecution recognized this one year earlier when it abandoned the prosecution after the finding of no probable cause. Furthermore, the above evidence does not substantially establish the commission of another crime by clear, convincing and conclusive proof and, thus, its admission into evidence constituted prejudicial error and a denial of process.

Secondly, since the incident involved did not make out a *prima facie* case nor was it supported by sufficient evidence under the applicable criteria, use of such evidence was violation of Petitioner's rights guaranteed under the Sixth Amendment under this Court's holding in *Burgett* v. *Texas*, 389 U. S. 109,

88 S. Ct. 258, 19 L. Ed. 2d 319. Under *Burgett,* any use during a trial of other crime evidence which itself is constitutionally infirm is violative of the Sixth Amendment. From as above, it is apparent that insufficient evidence existed regarding the Barnes incident to constitutionally support any conviction of Petitioner. Thus, its use and the inferences naturally flowing from such evidence during Petitioner's trial was constitutionally prohibited and improper. What the Prosecution was allowed to do in this case was to take two factually weak incidents, either one of which would not likely result in the conviction of Petitioner, and combine the two and present both during one trial to capitalize on the prejudicial inference the trier of fact got out of the other crime evidence and thereby insure Petitioner's conviction. This Petitioner submits does not comport with due process or equal protection guarantees nor Sixth Amendment Rights.

B.

The Prejudicial Effect of the Other Crime Evidence Far Outweighed Its Probative Value and the Trial Court Abused Its Discretion in Admitting This Evidence.

The second criteria for admission of "the other crime" testimony is that its probative value must outweigh its prejudicial effect. In determining probative value, one must consider the value the "other crime" evidence has in proving one or more of the elements of the charge on trial and must not consider admissibility on the basis that proof of the commission of the other crime makes it more probable that the Petitioner committed the instant crime. This latter inference is unpermissible under due process standards. In determining prejudicial effect under the "balancing test", the Court should consider the corroborating evidence, if any, and quantum of proof presented indicating Petitioner's guilt of the charge on trial independent of the "other crime" evidence. The Illinois courts have totally ignored this consideration. The case at bar involved a single

witness, the prosecutrix, who was totally uncorroborated by any other testimony or other evidence. The outcry testimony in reality did not amount to corroboration at all, but rather seriously undermined the prosecutrix' credibility because of the lengthy delay and lapse of approximately seven hours between the incident and the first outcry. The police were not called for over a week after the incident. No physical evidence was presented to corroborate the prosecutrix in the nature of the alleged weapon, bruises, a cut on her hand, torn clothing or medical reports. In fact, no medical examination was made. Added to this, the factual contest of the prosecutrix' testimony is inherently suspect where, by her own admission, she was on a date the evening in question with the Petitioner, whom she had previously known and was seen in public with, and consentually returned with him to her apartment by her own invitation late at night where she remained for over 4½ hours. This is especially so when one considers that by the prosecutrix own admission she and the Petitioner were seated on the couch engaging in consentual kissing and petting (Record pp. 158-168-170-171) and talking about going to bed together (Record pp. 170-180). Clearly, the absence of corroborating factors in a factual context such as this cannot be said to present an overwhelming case of rape or a solid prosecution case. Thus, it must be conceded that the State's case, factually, was inherently weak. For this reason, the "other crime" evidence weighed heavily and hence its prejudicial effect was great on the one side of the balancing test. This in itself is sufficient in and of itself to cast the admission of such evidence in a Constitutional context equivalent to a denial of due process. However, when the inconclusive and unconvincing nature of the "other crime" evidence, as argued above, is added to this fact, the prejudicial effect and due process infringement is further magnified.

Furthermore, not only does the "other crime" evidence fail to meet admissibility standards on the prejudicial effect side of the scale, close analysis of this evidence also shows that it had little, if any, probative value bearing on any of the issues in

the trial and, therefore, shouldn't have been admitted for this additional reason.

The "other crime" evidence in this case was admitted not so much on a theory of a comprehensive "common scheme" between the two incidents because the two situations between Barnes and Petitioner and Banich and Petitioner are really quite dissimilar. On the contrary, the other crime evidence was admitted based solely upon one common aspect between the two cases, *i.e.* the placement of an employment ad. Aside from this aspect, the two factual situations are totally dissimilar. No knife was used in the Barnes incident. No rape or assault took place in the Barnes incident. No evening out or invitation to go out on a date or to a ball game existed in the Barnes situation. On the contrary, Barnes, herself, repeatedly had to invite Petitioner to her apartment for a porno-marijuana party before he finally accepted and attended. This, in itself, belied any inference that the State contended existed in the ads as demonstrating a scheme to get acquainted with or lure girls into a situation where Petitioner might sexually assault them. Barnes' testimony did not establish any "scheme" so to speak in this regard. Clearly, it was not probative as to motive, design or intent because Petitioner never sexually assaulted Barnes. It was not probative to the issue of identity because identity was never an issue in this case, and the Petitioner readily admitted being with the prosecutrix the entire evening and the State had ample other witnesses to corroborate the identification of Petitioner in the form of the persons attending the party.

The only real issue in this case presented at trial was whether the sexual assaults took place and whether they were forcible. When one considers this, it becomes so patently obvious that not only was Barnes' testimony not probative to these to aspects or issues, but really did not corroborate Banich in this regard. Barnes was not raped or assaulted. Petitioner used no weapon with her and immediately desisted upon her slight *verbal* (not physical) resistance. How, then, can such testimony be probative as "common scheme" evidence to establish a forcible non-

consentual sexual assault? This question is rhetorical and the answer obvious—it simply is not. Then, the question remains: what probative value did it have?, and the answer is simply: none.

Thus, it is apparent that the only part such evidence played in this trial is the prejudicial effect it had in presenting Petitioner in a bad character and casting him as a bad person who because of this incident with Barnes "probably" commited the incident with Banich. This is the very vice of other crime evidence and its use in this context violates fundamental fairness and substantial due process considerations.

C.

The Other Crime Evidence Was Inadmissible Because It Did Not Fall Within the Common Scheme Exception.

It is apparent, as was shown above, that because of the important and numerous discrepancies and differences in the two factual situations, that Barnes' testimony not only did not establish any common scheme but, in fact, refuted a common scheme. The only aspect the two incidents had in common was an offer of employment contained in a newspaper ad and even then the nature of employment between the two incidents varied, one being for a permanent full-time secretarial position and the second (Barnes) being a one-shot clerical, spare time, at-home service. At any rate, this bare thread of similarity, *i.e.* the "want ad" is too contrived and shallow a pretext upon which to validly bottom the contention that a common scheme exists. This is especially so when all the other factors surrounding the two incidents establish a gross dissimilarity between the two so as to preclude any valid hypothesis that commission of the one indicates a probability of commission of the other. As was pointed out above, a weapon was allegedly used in the Banich matter; none was used on the Barnes matter. An alleged rape and deviate sexual assault occurred with Banich and none with Barnes.

Banich testified Petitioner allegedly refused to stop when she repeatedly asked him not to do it, while Barnes testified he immediately stopped when she said it would constitute rape. The Barnes incident occurred January 23, 1975 (Record pp. 278-249) about one week subsequent to the Banich incident. Osborn allegedly repeatedly called Banich for a date and took the initiative in this regard. Whereas in the Barnes incident, it was Barnes who repeatedly called Petitioner to pick up his papers and bring his porno movies over to her party, while Petitioner demonstrated almost reluctance to visit her apartment (Record pp. 278-279-280-281-291-293). The Barnes incident involved a party at her place where she invited the Petitioner to stay overnight after a porno and marijuana party. In Banich's case, it was a date situation where they went out to a basketball game, party, and returned to the prosecutrix' apartment allegedly at the Petitioner's suggestion. In the Banich incident, there is sexual foreplay in the nature of kissing and petting, whereas in the Barnes situation the Petitioner allegedly merely announced his attention to "ball" Barnes out of the blue after initially seeing her disrobed upon her bed (Record pp. 300-287-288). Deviate sexual conduct was allegedly engaged in in the Banich case, whereas nothing of that nature was attempted or indicated in the Barnes incident (Record p. 316). In the Barnes incident, the Petitioner never ordered Barnes to disrobe or attempted to disrobe her himself and never fondled or attempted to fondle or touch her breasts, vagina or any other part of her body, whereas this conduct was alleged to have occurred with Banich (Record p. 316). In the Banich incident, the Petitioner allegedly disrobed; in Barnes' case, he did not (Record p. 77). In Banich's case, after the alleged incident, she ordered the Petitioner out of her apartment, but he refused to leave and remained another 45 minutes talking about why he allegedly did it and his general philosophies on pre-marital sex and sexual experiences (Record pp. 82-83-84), whereas in the Barnes' case he left immediately upon being ordered out by Barnes (Record p. 288).

Another factor exists in this case further showing how prejudicial the "other crime" evidence was in this trial. Barnes did not merely testify to the common aspect of the case, *i.e.* the placing of the ad by Petitioner. She testified in denial to the minute specifics of the entire incident between herself and Petitioner. Even if such evidence was admissible for the limited purpose of the ad, the Trial Court must take particular care to limit the extent of such testimony solely to the probative and relevant similarities and avoid going into the details of the other crime which are not relevant. In this case, the Court abused its discretion by letting the entire other incident and all of its surrounding details and the Appellate Court endorsed the error and ignored it.

Thus, from the above, it is apparent that by close analysis the two incidents really have no common denominator or *modus operandi* that permeates the incidents or that so interrelates them as to make such evidence of a common scheme as to the other. The only common factors between the two incidents is that both incidents had sexual overtones (albeit the sexual connotation of the two incidents are grossly divergent) and the prosecutrix in each became acquainted with Petitioner through employment ads he had placed.

It is submitted that in light of the vast differences between the two incidents these two slightly similar factors cannot justify a conclusion that a common scheme was shown to exist upon which to base admission of such prejudicial evidence. If the first aspect (sexual overtones) was a valid consideration, then in all cases where a defendant is charged with multiple sex offenses, one would be admissible as proof of the other under common scheme, despite any other consideration of identity between the incidents and without regard to even the character or nature of the alleged sexual conduct involved. Clearly, this is not the law.

The remaining aspect in common, *i.e.* the employment ad, is simply insufficient to establish a "common scheme". As was pointed out previously, its only probative value was to identify

Petitioner as the ad placer, if that factor was in issue in this case. But identity in the *Banich* case was never a factor and not in issue. The Petitioner never denied placing the ad or being with Banich at the basketball game, the party or her apartment. The "ads" placed in the two cases were, themselves, surrounded by different circumstances and were not identical or similar. In *Banich*, the ad was for a full-time secretarial position calling for the applicant to call a telephone number for a job interview. After Ms. Banich called the number, an interview was arranged whereby she went to Osborn's apartment. Thereafter, Osborn repeatedly called until they eventually went out on a date. In the incident with Barnes, she answered an ad for a one-time collating job where work was dropped off at her apartment to be done at her leisure for a fixed price; after completion of which, she had to repeatedly call Osborn to come over to pay her and pick it up. Only incidentally thereto did the invitation to the marijuana-pornography party ensue at Barnes' initiative. Thus, even the ads, themselves, aside from relevancy and probative value, do not possess the requisite identical characteristics upon which to base a contention of "common scheme" evidence.

The Illinois Courts have totally ignored and utterly failed to consider the numerated factors set forth above enumerating gross dissimilarity between the Barnes incident and the Banich incident. These factors totally destroy and contradict the total rationale of the opinion finding that the two incidents reflect a *modus operandi*. In short, the Court considered only the common factors of each incident and totally ignored the many dissimilarities. When both are properly considered and compared, the comparison clearly establishes that the Barnes incident does not establish any common scheme and, in fact, refutes and impeaches the testimony of Banich.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Illinois Supreme and Appellate Courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, on oath deposes and says that a true copy of the attached and foregoing Petition for a Writ of Certiorari in the case of *Mark L. Osborn* v. *State of Illinois* was personally served on Bernard Carey, State Attorney, Richard J. Daley Civic Center, Chicago, Illinois, and William J. Scott, Attorney General of the State of Illinois, 188 W. Randolph St., Chicago, Illinois, on this the ..... day of June, 1978.

.....

Subscribed and Sworn to before me this 23rd day of June, 1978.

/s/ PATRICIA ZUCKER

(SEAL)

APPENDIX

EXHIBIT "A"

76-542

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
MARK L. OSBORN,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County; the Hon. Saul A. Epton, Judge, presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Mark L. Osborn (defendant), was found guilty of rape (Ill. Rev. Stat. 1975, ch. 38, par. 11-1) and two acts of deviate sexual assault (par. 11-3). He was sentenced to 5 to 15 years on the rape conviction. He appeals.

In this court, defendant contends that the court erred in admitting hearsay outcry evidence and in considering evidence of other crimes or criminal acts disassociated with the charges for which defendant was tried; the evidence was insufficient to prove defendant guilty beyond a reasonable doubt and the court considered improper evidence in sentencing the defendant.

The complainant testified that on December 2, 1974, she made a telephone call in response to a help wanted advertisement in the Chicago Tribune. She recorded her name and phone number on the telephone answering machine. On December 15, the witness received a return telephone call from a man who identified himself as Doctor Mark Osborn of the National Institute of Behavior Counseling. During this call a job interview was scheduled. Three days later the witness met defendant in

the prearranged location, a Chicago apartment with appearance similar to an office. A 15 minute interview was ended with no decision about the job. Defendant later told the witness that he lived in the apartment.

The witness testified that on January 11, 1975, defendant called and invited her to a hockey game. She refused. On January 17, defendant again called. He said he wanted to finish discussing the job interview. He invited her to attend a basketball game with him and another couple. She told him that she was going to a party at a friend's home. They agreed to go to the party and also to the game the following evening.

The witness further testified that she and defendant went to the party at the apartment of her friends David and Nickey Krause. After defendant's friends, Howard McArthur and a woman named Nancy, arrived at the party, the two couples went to a basketball game. They returned to the party where they stayed until about 12:30 a.m. After the two couples left the party, defendant remarked that it was a cold night and asked the witness whether he could come up to her apartment for coffee and she agreed.

The witness fixed a hot drink for defendant and they conversed for a short time. Defendant then said, "I usually go to bed with everybody I go out with." The witness testified that she responded, "I don't." Defendant also said, "[I]f I don't go to bed with a woman I don't call her again." The complainant answered, "[T]hat's fine with me, you don't have to call me again." After further conversation, at defendant's request the witness brought him a beer, which he preferred over the tomato juice she had also offered.

Defendant said he planned to leave but first had to use the washroom. The witness testified defendant then walked down a hall where the bathroom was located directly to the left of the kitchen. The witness did not see him enter the bathroom and he returned 8 to 10 minutes later. Defendant sat next to her on the couch and said, "I don't want to alarm you but I'm going to

have sex with you." He grabbed and squeezed her throat and pushed her back onto the couch. Defendant lay on top of the witness and held a knife at her throat. She testified she recognized the knife as a steak knife from her kitchen drawer. She tried to scream but was unable to do so.

Defendant ordered the witness to undress while he counted up to five. He got up and stood next to the couch. She did nothing but told him, "I know who you are and I know where you live. You can't do something like this." Defendant told her, "[I]f you go to anybody or you say anything I'll come back here and get you." He squeezed her throat harder than he had the first time. When the witness tried to push him away, defendant continued to hold the knife at her throat. She testified further that defendant said, "you don't believe I'm going to use this knife * * *" and then ran the knife blade across her thumb, piercing her skin. When defendant again ordered her to undress, she complied and he also removed his clothes.

The complainant related that defendant refused her request for permission to leave the room to remove a sanitary device she wore because of her menstrual period. She removed the device in the living room upon defendant's order. The witness was crying and asking defendant to "get out" and to "please leave me alone." She testified that defendant then pushed her onto the couch and forced her mouth into contact with his penis for 5 seconds. He then placed his mouth on her vagina for about a minute. The witness was crying and sobbing. Defendant lay on top of her, forced her legs apart and engaged in three acts of intercourse during the next half hour. She testified that during this time she cried and held her hands over her face.

After the final act of intercourse, the witness told defendant to get out and he permitted her to put on clothing. Defendant remained in the apartment for 45 minutes. The complainant related, during this time defendant warned her that "nobody better find out about this." He left the apartment at about 4 a.m.

The witness testified that she stayed on the couch, wrapped in blankets until she arose at about 10 the next morning. At that time, she telephoned the Rape Crisis Line and to the person who answered she said that she "wanted to report a rape." She did not speak to a member of the organization which operated the crisis line. About 1 minute later, she telephoned her friend Nickey Krause and told her she had been raped. She also said that she was "afraid to be in the apartment because Osborn had threatened to come back." About an hour later, the witness also called her mother. That night she slept at the Krause apartment.

During cross-examination, the complainant testified that she met defendant on January 18 because she was interested in the job but that she and defendant did not discuss employment that evening. When she and defendant were sitting on the couch after the witness had brought him a hot drink, defendant put his arm around her and did not remove it when told to do so. He then touched her breast and was "getting friendly" with her.

That evening, she stated during cross-examination, she did not see defendant in her kitchen. When he returned from the bathroom she did not see his hands. The kitchen is 6 to 7 feet further down the hall from the bathroom. She also testified that she took a shower soon after defendant left her apartment. She did not speak to the police until the Saturday following the incident and she did not go to a hospital until two weeks later when she obtained a venereal disease test. She testified that she did not tell her mother about the rape during their telephone conversation on January 19.

David Krause testified that during the party at his apartment on January 18, he saw the complainant remove her arm from defendant's hand and shrug his hands from her shoulders. He also related that he and his wife went to the complainant's apartment the afternoon of January 19 and took her back to their apartment where she stayed overnight. When they arrived at the complainant's apartment that afternoon, she was pale and

white and had circles under her eyes. The witness did not see her hand at that time. Nickey Krause corroborated the fact that she had received a telephone call from the complainant on the morning of January 19.

Linda Barnes testified for the State that on January 16, 1975, she called the defendant in response to a help wanted newspaper ad. One hour later, at 11p.m., defendant came to her apartment and left materials which she was to collate and staple for a fee of $15. She testified that when defendant did not pick up the materials on January 19 as they had agreed, she tried to contact him several times by phone.

On January 23, the witness told defendant by telephone that she needed the money for her services and told him to come to her apartment that evening. She testified, defendant arrived at the apartment about 10:30 or 11 p.m. The witness, her husband and another couple were present. They watched vacation movies and two films defendant had brought. The witness described these two films as "pornographic." When the other couple left, defendant began to fall asleep. At the witness' suggestion, defendant stayed the night in the guest room.

Mrs. Barnes further testified that the next morning, after her husband had left, defendant stood in her bedroom doorway and "asked if he could get in bed with me." She answered "No" and defendant said "he wanted to ball me." She again refused. The witness went into the kitchen followed by defendant. He made out a check for her work, they talked briefly and defendant gathered his belongings to leave. She testified that while they were standing in the foyer, defendant grabbed her by the throat, said "we were going to bed together," and backed her into the bedroom while holding her throat. He tore her robe partially open. When the witness told defendant to understand that "it was a rape," he pushed her onto the bed and left.

On cross-examination, she stated that an attempt rape charge against defendant based on the incident in her apartment had

resulted in a finding of no probable cause at the preliminary hearing. She also testified that she had invited defendant to her apartment for a party the night of January 23 and had asked him if he would like to bring pornographic films.

Howard McArthur, a defense witness, testified that on January 18, after he, his date, defendant and the complainant left the Krause party the second time, he remembered that the complainant invited defendant to come to her apartment. He stated a verbatim version of the conversation. However, the witness could not remember what date the party was held, what time he left the party, whether or not he went to a basketball game or what time they returned to the party after the game.

Defendant testified that he called for the complainant at her home. He escorted her to the Krause party where they stayed about 45 minutes. They met Howard McArthur and his date there and they all went to the basketball game. The complainant did not object to his "quick" kisses, to holding hands or to his putting his arm around her. They then all returned to the party where he and complainant had the same amount and type of physical contacts. All four of them left the party together. Defendant and the complainant returned to her apartment at her invitation. She asked him to go there and "have a drink."

Defendant testified further that in the apartment they put their arms around each other. They kissed and petted to the point of intimate physical contact until the complainant requested him to stop because she was having her menstrual period. No sexual intercourse or other intimate sexual contact occurred between them. Defendant related that they conversed and watched television. After the program ended, about 2 or 2:30 a.m., she asked him if he had selected someone for the job. He told her that he had. After a short conversation the complainant told him to leave "right now" because she was very tired.

On cross-examination, defendant admitted that he was neither a medical doctor nor a PhD. He stated that the Institute for

Behavioral Counseling was his organization and had been in existence for 6 months prior to the complainant's application for a job. Three other persons in the field of psychology were affiliated with this counseling service. Defendant could remember none of the names of these three associates in his business.

Defendant first urges that testimony by the complainant regarding statements she herself made on the telephone to the "rape crisis" people and to her friend Nickey Krause; and statements testified to by Nickey Krause which she made on the telephone to the complainant are improper as hearsay. We disagree. The situation concerns testimony by witnesses who are under oath and subject to cross-examination in open court regarding statements which these witnesses themselves made.

This situation is governed by the leading and frequently cited case, *People* v. *Carpenter* (1963), 28 Ill. 2d 116, 120-22, 190 N. E. 2d 738. Since the witnesses in the case before us testified only as to what they themselves said, and were available for cross-examination, their testimony was not hearsay. The case before us is, therefore, not a situation in which an attempt is made to introduce testimony by a third person regarding statements made by a complainant. There is no issue of remoteness of the declarations here from the point of view of an exception to the hearsay rule since we are dealing only with statements made by the witnesses themselves which are not hearsay. This testimony was properly received by the trial court. *Carpenter; People* v. *Johnson* (1976), 42 Ill. App. 3d 425, 432-33, 355 N. E. 2d 699, *leave to appeal denied,* (Jan. Term 1977), ... Ill. 2d .....; see *People* v. *Poole* (1970), 121 Ill. App. 2d 233, 238-39, 257 N. E. 2d 583.

Defendant also contends that complainant's statements to the Rape Crisis Line and to Nickey Krause on the morning of January 19 were inadmissible as self-serving declarations. This specific objection was not raised at trial and is therefore waived for purposes of appeal. *(People* v. *Hampton* (1977), 46 Ill. App. 3d 455, 463-664, 360 N. E. 2d 1333 citing *People* v. *Jones*

(1975), 60 Ill. 2d 300, 306-07, 325 N. E. 2d 601.) Even without the waiver, the principle advanced by defendant applies only to proof by a party of his own self-serving statements. *(People* v. *Colletti* (1968), 101 Ill. App. 2d 51, 55, 242 N. E. 2d 63, *cert. denied,* 396 U. S. 927.) The complainant was not a party to these proceedings. See *People* v. *O'Neal* (1976), 44 Ill. App. 3d 133, 136, 358 N. E. 2d 47, *leave to appeal denied,* 64 Ill. 2d 598.

In this court, defendant also asserts that complainant's testimony that she stated she had been raped was not admissible as a corroborative complaint under *People* v. *Damen* (1963), 28 Ill. 2d 464, 193 N. E. 2d 25. This question was not raised in the trial court in any manner and is accordingly waived. *(Hampton; People* v. *Harvey* (1976), 41 Ill. App. 3d 869, 870, 354 N. E. 2d 393.) Further, in light of complainant's clear and convincing testimony on direct examination that she had been raped by defendant and the corroborative common design evidence, as above reviewed, we cannot conclude that admission in evidence of her subsequent complaints could have been plain error, affecting substantial rights. See *People* v. *Howell* (1975), 60 Ill. 2d 117, 120-21, 324 N. E. 2d 403; *People* v. *Harbarugh* (1976), 40 Ill. App. 3d 295, 299-300, 352 N. E. 2d 412; Ill. Rev. Stat. 1975, ch. 110A, par. 615(a).

Defendant charges that the trial court improperly received the evidence of Linda Barnes as above summarized. It is correct that as a general rule the courts of Illinois have rejected efforts to prove guilt of the offense on trial by proof of other crimes allegedly committed by the defendant. *(People* v. *Stadtman* (1974), 59 Ill. 2d 229, 231, 319 N. E. 2d 813.) However, as exemplified by two recent decisions of the Supreme Court of Illinois, the exception has been strongly established that evidence relevant to the issue of guilt of the offense on trial may be admissible even though it may also tend to establish guilt of the commission of another crime. Where the challenged evidence "goes to show motive, intent, identity, absence of mistake or

modus operandi * * *" it is admissible though it may incidentally show the commission of a separate offense. *(People* v. *McDonald* (1975), 62 Ill. 2d 448, 455, 343 N. E. 2d 489 and cases there cited. See also *People* v. *Romero* (1977), 66 Ill. 2d 325, 330, 362 N. E. 2d 288.) In *McDonald,* the court paraphrased the principle as providing "that evidence of other offenses is admissible if relevant for any purpose other than to show propensity to commit a crime." 62 Ill. 2d 448, 455.

The issue before us is whether the trial court abused its discretion in admitting Barnes' testimony as evidence of a common design or *modus operandi.* In reviewing the admissibility of this evidence, we must determine whether "all of the evidence shows that both crimes were 'so nearly identical in method as to earmark them as the handiwork of the accused' * * *." (*People* v. *Emmett* (1975), 34 Ill. App. 3d 167, 170, 340 N. E. 2d 235 quoting McCormick, Evidence § 190, at 449 (2d ed. 1972).) In three recent decisions involving convictions for sex offenses, this court has analyzed several points of comparison between details of the offenses charged and testimony offered to prove defendant's commission of other crimes as proof of a common design. *(People* v. *Therriault* (1976), 42 Ill. App. 3d 876, 356 N. E. 2d 999, *leave to appeal denied,* (Jan. Term 1977), ... Ill. 2d ....., *Emmett,* 34 Ill. App. 3d 167; *People* v. *Scott* (1972), 4 Ill. App. 3d 279, 280 N. E. 2d 715, *leave to appeal denied,* 52 Ill. 2d 596.) In these cases, in upholding the admissibility of the evidence of other crimes we considered several common factors with no single element of similarity or combination of such elements emerging as essential to the competence of the testimony. However, these decisions reveal several significant points of comparison which were relied on to support the admissibility of the common design evidence.

In *Therriault,* defendant gained entry to the victims' homes through kitchen windows. This was his common method of initial contact with both women. In *Emmett* and *Scott,* defendants followed eventual victims into elevators in their apartment build-

ings. In *Emmett,* defendant initiated conversations with both victims. (34 Ill. App. 3d 167, 170.) The type of force used against the victims was significant in *Emmett* where defendant, while holding a knife, put his hand over one victim's mouth and his arm across the other's neck. In *Scott,* defendant threatened and cut the complainant with her own knife. In the other offense he only threatened the woman with a knife. The location of the sexual attacks was commented on in *Therriault* and *Emmett* where the offenses occurred on the bed of each victim after defendant had forced her to lie or sit thereon. Finally, the time span between offenses was held to be among the relevant circumstances in showing common design. In *Emmett,* (34 Ill. App. 3d 167, 170), the crimes were 12 days apart and in *Therriault* one month intervened between the offenses. (42 Ill. App. 3d 876, 886.) In all three of these cases the challenged evidence of other crimes was held competent.

Close examination of the Linda Barnes testimony and comparison with that of the complainant shows a number of strong elements of factual similarity as in the cases above cited. In both cases, the woman made contact with the defendant by means of a newspaper advertisement for help. In both cases, the original contact was for employment but, in good part as a result of the efforts of defendant, the relationship soon broadened into a social and more personal type of contact. Both of the incidents occurred in the privacy of the homes of the respective complainants to which defendant had been invited. In both situations defendant expressly told the woman he was going to have sexual relations with her. In both cases he depended upon physical force in commencing to obtain his stated desire. In both instances he seized the woman forcefully by the throat. In both cases, however, the defendant's conduct was sexually motivated. In *McDonald,* the supreme court pointed out four examples of paralellism between the offenses. (62 Ill. 2d 448, 455.) Evidence of the former incident was held competent. It is correct that in the case before us differences between the two situations existed.

But, in our opinion, the factual similarities between these two situations are so strong and persuasive that they are sufficient to make evidence of the earlier offense relevant as proof of the existence of a common design and *modum operandi.* We note also that the testimony of Linda Barnes stands uncontradicted.

Defendant maintains that the testimony of Linda Barnes was inadmissible because it did not establish the commission of a crime. Defendant correctly points out that in *People* v. *Scott* (1973), 13 Ill. App. 3d 620, 301 N. E. 2d 118, the court stated that prior to admission of evidence of other crimes "it must first be shown that a crime actually took place and that the defendant committed it * * *." (13 Ill. App. 3d 620, 626.) In *Scott,* evidence of defendant's possession of checks imprinted with names other than his was held inadmissible in a trial for armed robbery occurring in an office building where the State failed to connect the checks with any of the offices or tenants of the building. In the record before us, the testimony of Barnes that defendant grabbed her throat, announced his intention to "go to bed" with her, forced her into the bedroom and tore her robe partially open was convincing proof of the crime of attempt rape, being a substantial step toward the commission of rape with the specific intent to commit that offense. *People* v. *Almond* (1975), 31 Ill. App. 3d 374, 377-78, 333 N. E. 2d 236; Ill. Rev. Stat. 1975, ch. 38, par. 8-4; see *People* v. *Miller* (1976), 40 Ill. App. 3d 761, 762-63, 353 N. E. 2d 145.

Defendant places heavy emphasis on the fact that, after the Linda Barnes incident, a charge of attempt rape was dismissed after a preliminary hearing. Defendant cites *People* v. *Butler* (1975), 31 Ill. App. 3d 78, 334 N. E. 2d 448, *leave to appeal denied,* 61 Ill. 2d 598. Defendant further relies on *Butler* in arguing against the reception of the Barnes testimony because its probative value was outweighed by its prejudicial impact. In *Butler,* defendant was tried before a jury for armed robbery of a store manager. The State's theory was that defendant had previously committed another armed robbery of the same person

at a different store in the same town. The State offered evidence of the earlier robbery, as to which defendant had been acquitted, as proof of identification. This court reversed a conviction for the second robbery on the theory that the evidence of the earlier crime was prejudicial. The complaining witness had testified at length regarding the details of the first offense which "were clearly unrelated to the crime in question and were unnecessary to establish identity * * *." (31 Ill. App. 3d 78, 81.) The *Butler* court also pointed out that the majority American rule is that acquittal of the prior offense does not necessarily render evidence thereof incompetent. The prior acquittal does not require application of the theories of estoppel by verdict of res judicata. 31 Ill. App. 3d 78, 81 n. 2.

As we have previously set out in detail, the substance of Barnes' testimony was probative of a common design or *modus operandi*. *Butler* is distinguishable, therefore, because in that case details of the other offense unnecessary to the identity issue were admitted in evidence. Further, the holding in *Butler* was based on the determination that the prejudicial impact of the evidence upon the jury outweighed the probative value of the testimony (31 Ill. App. 3d 78, 81). The operation of the balancing test used in *Butler* is of minimal value in a bench trial where the evidence is fully disclosed to the court so that its admissibility may be decided.

Defendant also urges along these same lines that Barnes' testimony was not admissible because it did not prove commission by defendant of rape or deviate sexual assault, the offenses for which he was on trial. We cannot agree. The law of Illinois does not require that both offenses be identical. *People* v. *Yonder* (1969), 44 Ill. 2d 376, 390, 256 N. E. 2d 321, *cert. denied*, 397 U. S. 975, and *People* v. *Lehman* (1955), 5 Ill. 2d 337, 343, 125 N. E. 2d 506, demonstrate that the critical question is not identity of the two offenses but is whether a comparison of the acts as a whole in both offenses demonstrates a common design and the same *modus operandi*.

We conclude that the proof here shows convincingly the same *modus operandi* and that the evidence of Linda Barnes was competent.

Defendant also cites *People* v. *Ulrich* (1963), 30 Ill. 2d 94, 195 N. E. 2d 180. Defendant there was tried for indecent liberties with a child. The State sought to prove similar acts with another child, both arising out of the same incident. Defendant had previously been acquitted when tried for the former acts. The supreme court there pointed out that evidence of the former crime was not only highly prejudicial but would not serve to prove any factual issue as to the later offense. The decision is therefore not pertinent here.

Defendant maintains that the evidence was insufficient to support the findings of guilty because the complainant's testimony was highly suspect and self-impeaching. He relies upon: the delayed outcry by the complainant, lack of medical evidence, absence of evidence of bruises or other trauma in spite of complainant's testimony that her thumb had been cut, the State's failure to introduce the knife in evidence, delay in reporting the crime to police and alleged discrepancies between the complainant's testimony on direct and on cross-examination.

In rape cases, we are bound by a special duty to examine the evidence carefully. (*People* v. *Reese* (1973, 54 Ill. 2d 51, 57, 294 N. E. 2d 288.) If the testimony of the complainant is found to be clear and convincing, that testimony alone will support a conviction for rape, despite a denial by defendant. (See *People* v. *Martinez* (1976), 39 Ill. App. 3d 934, 937, 351 N. E. 2d 293; *People* v. *Hendon* (1975), 33 Ill. App. 3d 745, 749, 338 N. E. 2d 472, *leave to appeal denied*, 62 Ill. 2d 590.) On the other hand, if the testimony of the complainant is not clear and convincing, corroboration is necessary. (*People* v. *Jones* (1976), 40 Ill. App. 3d 850, 857-58, 353 N. E. 2d 375, *leave to appeal denied*, 64 Ill. 2d 597; see *People* v. *Brown* (1975), 32 Ill. App. 3d 182, 187, 336 N. E. 2d 523.) Minor variances in a complainant's testimony may go to the question of credibility,

but will not raise the corroboration requirement where the testimony is otherwise clear and convincing. (*People* v. *Williams* (1975), 33 Ill. App. 3d 219, 222, 338 N. E. 2d 133.) Finally, in a bench trial, the trial court must determine the weight and credibility of all testimony presented and "make a finding as to whether the guilt of the accused had been established." (*Reese*, 54 Ill. 2d 51, 59 quoting *People* v. *Walcher* (1969), 42 Ill. 2d 159, 165, 246 N. E. 2d 256.) A reviewing court "will not set aside a finding of guilty unless the evidence is so palpably contrary to the finding or so unreasonable, improbable or unsatisfactory as to cause reasonable doubt as to the guilt of the accused. [Citation]." 54 Ill. 2d 51, 58.

Upon careful study of the record, we conclude that the testimony of the complainant was clear and convincing that defendant, by squeezing her throat, by threatening and cutting her with a knife and by physical superiority overcame her resistance and completed the offenses charged. Under thorough and vigorous cross-examination, her testimony remained positive and certain as to all major elements and nearly every minor detail of her version of the incident. Notably, the trial court expressly found the complainant's testimony to be "clear and convincing" and further stated: "There was no question about her statements. I doubt that there was an iota of fiction. All fact."

Defendant's arguments against the sufficiency of the complainant's testimony divide into two categories: inherent inconsistencies and improbabilities; and lack of corroboration. In the first category, defendant relies on portions of complainant's testimony during cross-examination which were not included in her direct examination. On cross-examination, complainant related that defendant put his arm around her and touched her breast when they returned to the apartment from the Krause party. However, the complainant also testified on cross-examination that during this incident she told defendant to remove his arm and she moved away from him. Defendant's additional argument that the delayed outcry by complainant rendered her testimony unconvincing is not persuasive. The time between the complaint of rape and the offense " 'will naturally vary in accordance with the circumstances of each particular case and there is no definite limit of time within which the complaint must be made.' " *Reese*, 54 Ill. 2d 51, 58 quoting *People* v. *Garreau* (1963), 27 Ill. 2d 388, 392, 189 N. E. 2d 287.

The record before us shows that the physical and emotional ordeal of three acts of intercourse and two deviate sexual assaults was also accompanied by complainant's physical struggle with defendant. The incident did not end until very early in the morning and defendant threatened the complainant before leaving the apartment. After spending the night wrapped in a blanket, the complainant arose at 10 a.m. and reported the rape to both the Rape Crisis Line and her friend Nickey Krause. Under the circumstances, the delay was not sufficient to cast serious doubt upon her testimony. Similarly, the 5 to 6 day interval between the rape and complainant's first conversation with a police officer does not alter our appraisal of her testimony. In light of the complainant's statements to the Rape Crisis Line and to Nickey Krause on the morning of January 19, the delay in contacting the police does not prove fabrication. We view this delay as more indicative of consideration whether to tell the details to the police and involve herself in a prosecution. Finally, other discrepancies in the victim's testimony are no more than minor variances which were properly resolved as credibility questions by the trial court.

Defendant also points to the State's failure to place the knife in evidence, the absence of medical evidence of rape and the lack of corroboration of complainant's testimony that her thumb had been cut. Under the foregoing authorities, since we have concluded that the complainant's testimony was clear and convincing, no corroboration is necessary to support the convictions. Further, the lack of medical evidence is not critical because such testimony "is not required to prove a rape * * *." (*Reese*, 54 Ill. 2d 51, 58 quoting *People* v. *Boney* (1967), 38 Ill. 2d 23,

24, 230 N. E. 2d 167.) We also note that complainant did obtain a venereal disease test at a hospital two weeks after the rape.

In addition, even if we found complainant's testimony to be unconvincing, corroboration was supplied by competent evidence of common design or *modus operandi*. Upon close scrutiny of the entire record, we are sonvinced that the evidence amply supports the finding of guilty and is not so improbable or insufficient as to create a reasonable doubt of defendant's guilt.

Defendant objects to the sentence of 5 to 15 years. He also objects to evidence which the court heard in aggravation. In our opinion, since the sentence should be reduced to the statutory minimum of 4 years, consideration of the latter contention is not required. Defendant had but one prior misdemeanor conviction in another state. No serious physical injury was inflicted upon the complaining witness. Upon due consideration of all of these matters, we regard this situation as proper for the exercise of our authority to reduce the sentence. (Ill. Rev. Stat. 1975, ch. 110A, par. 615(b)(4).) The sentence is accordingly reduced to a minimum of 4 years and a maximum of 8. As thus modified the judgment for rape is affirmed.

The court found defendant guilty of rape and two acts of deviate sexual assault. Only one sentence was imposed. We will accordingly vacate the incomplete judgments entered on the two counts of deviate sexual assault. *People* v. *Lilly* (1974), 56 Ill. 2d 493, 309 N. E. 2d 1.

Judgment for rape affirmed as modified. Judgments for deviate sexual assault vacated.

McGLOON and O'CONNOR, JR., *J.J.*, concur.